85-1307

No. 85-

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

NANTAHALA POWER AND LIGHT COMPANY, TAPOCO, INC., and ALUMINUM COMPANY OF AMERICA,

Appellants,

—v.—

STATE OF NORTH CAROLINA ex rel. UTILITIES COMMISSION; LACY H. THORNBURG, Attorney General, et al.,

Appellees.

ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

This case presents the same federal questions presented in *Nantahala Power and Light Company v. North Carolina ex rel. Utilities Commission*, No. 85-568 (probable jurisdiction noted, Dec. 9, 1985) (*Nantahala I*) and *Nantahala Power and Light Company v. North Carolina ex rel. Utilities Commission*, No. 85-1165 (jurisdictional statement filed, Jan. 10, 1986) (*Nantahala II*):

Whether the Federal Power Act and the Commerce Clause permit a State to set retail electric rates by adopting different interstate wholesale cost and power allocations than prescribed by FERC's regulation and by giving that state's citizens a preference to the low-cost hydro-electric power generated in a multi-state area?

PARTIES BELOW

The appellants in the North Carolina Supreme Court were State of North Carolina ex rel. Utilities Commission: Lacy H. Thornburg, Attorney General; Public Staff of the North Carolina Utilities Commission; Henry J. Truett; Town of Bryson City; Swain County Board of County Commissioners; Cherokee County; Graham County; Jackson County; Town of Andrews; Town of Dillsboro; Town of Robbinsville; Town of Sylva; Tribal Council of the Eastern Band of Cherokee Indians; Henry J. Truett, Howard Patton, Veronica Nichols, O.W. Hooper, Jr., and Alvin E. Smith; and Jackson Paper Company.

The appellees in the North Carolina Supreme Court were Nantahala Power and Light Company, Tapoco, Inc., and Aluminum Company of America.

RULE 28.1 STATEMENT

Petitioners Nantahala Power and Light Company and Tapoco, Inc. are each wholly-owned subsidiaries of Aluminum Company of America ("Alcoa"). Alcoa has no parent company. The companies (other than wholly-owned subsidiaries) in which Alcoa has ownership interests are listed in a supplemental statement that appears in the Appendix to the Jurisdictional Statement (151a–157a).

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ON APPEAL FROM THE SUPREME COURT OF NORTH CAROLINA

JURISDICTIONAL STATEMENT

OPINIONS BELOW

The opinion and judgment of the North Carolina Supreme Court (Appendix ("App.") 3a-51a) is reported at 314 N.C. 122 and 333 S.E.2d. 453. The opinions of the North Carolina Utilities Commission, dated November 29, 1983 (App. 113a-131a), December 22, 1983 (App. 67a-111a), and April 12, 1984 (App. 53a-66a) are unreported.

JURISDICTION

The judgment of the Supreme Court of North Carolina was entered on August 13, 1985. App. 3a. Appellants' timely petitions for rehearing were denied on November 5, 1985.

App. 1a, 2a. Nantahala Power and Light Company filed a notice of appeal on January 27, 1986 (App. 149a), and Tapoco, Inc., and Aluminum Company of America each filed notices of appeal on January 24, 1986. *See* App. 147a–148a. This Court has jurisdiction under 28 U.S.C. § 1257(2). *See Nantahala Power and Light Co. v. North Carolina ex rel. Utilities Commission*, No. 85-568 (probable jurisdiction noted December 9, 1985) (*Nantahala I*).[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS

The United States Constitution, Article VI, Clause 2: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land. . . ."

The United States Constitution, Article 1, Section 8, Clause 3: "The Congress shall have Power . . . [t]o regulate Commerce . . . among the several States. . . ."

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1 In the instant case, the North Carolina Supreme Court reversed a retail electric rate decision of the North Carolina Utilities Commission ("NCUC") and remanded the case for consideration of whether retail rates should be set by rejecting the interstate cost and power allocations from the pertinent FERC rate schedules and, instead, adopting the allocation methodology from *Nantahala I*. This decision thus also rested on the North Carolina Supreme Court's holding in *Nantahala I* that a North Carolina statute (N.C. Gen. Stat. § 62-133) authorized such actions and was not preempted by the Federal Power Act. *See* Jurisdictional Statement in *Nantahala I*, No. 85-568 (filed Sept. 30, 1985) at 2 n.1.

At the same time, there was an alternative basis for appellate jurisdiction in *Nantahala I* that is not present here. Because a final retail rate order had been affirmed in *Nantahala I*, appellate jurisdiction could also have been noted there on the ground that final rate orders under delegated legislative authority have been treated as "state statutes" for purposes of 28 U.S.C. § 1257(2). *See Sultan Ry & Timber Co.* v. *Dept. of Labor & Indus.*, 277 U.S. 135, 136 (1928). If this distinction between *Nantahala I* and this case forecloses the exercise of appellate jurisdiction here, appellants request that this jurisdictional statement be treated as a petition for certiorari.

In all events, the North Carolina Supreme Court's decision is a final judgment within the meaning of 28 U.S.C. § 1257. *See infra* p. 5-6.

The pertinent provisions of the Federal Power Act, 16 U.S.C. §§ 791a-828c, and of the North Carolina Public Utilities Act, N.C. Gen. Stat. §§ 62-1, *et seq.*, are reprinted at App. 133a-141a; 143a-145a.

STATEMENT OF THE CASE

This is the third, and last, in a series of the pending cases between these parties that present the question whether a State may set retail electric rates by rejecting the interstate wholesale cost and power allocations that result from FERC regulation and by, instead, giving that state's citizens a preference to low-cost hydroelectric power generated in a multi-state area. Because the disposition of this case should be governed by this Court's decision in *Nantahala Power and Light Co. v. North Carolina ex rel. Utilities Commission*, No. 85-568 (probable jurisdiction noted, Dec. 9, 1985) (*Nantahala I*), this case should simply be held for *Nantahala I*, which should be decided this term.

In *Nantahala I* (and *Nantahala II*)[2], the North Carolina Utilities Commission ("NCUC") made its own determinations of how wholesale costs of generating and transmitting electricity should by allocated between a public load in North Carolina and a manufacturing load in Tennessee. In its final decisions, the NCUC adopted a methodology that assigned to North Carolina radically more of low-cost hydroelectric power than had FERC's rate schedules and decisions, with North Carolina's share of the low-cost power to increase each year.[3] In consequence, the NCUC excluded from Nantahala's retail

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2 *Nantahala Power and Light Co.* v. *North Carolina ex rel. Utilities Commission*, 314 N.C. 246, 333 S.E.2d 217 (1985), *jurisdictional statement pending*, No. 85-1165 (filed January 10, 1986). The principal parties in all three cases are the same. In *Nantahala II*, as in this case, appellants have urged that the appropriate disposition is to hold the case for *Nantahala I*.

3 *See* Appellants' Brief in *Nantahala I*, No. 85-568 (filed Jan. 22, 1986) at 9-14.

rates and revenue requirements millions of dollars of costs that were incurred as a result of the pertinent FERC rate schedules, with Alcoa, the Tennessee manufacturer, to fund "refunds" to Nantahala's customers in North Carolina.[4] In *Nantahala I*, this Court will decide whether the Federal Power Act and the Commerce Clause permit States to disregard, and thus effectively nullify, FERC-regulated wholesale rate schedules and interstate cost and power supply allocations.

In this case (*Nantahala III*), the NCUC set retail electric rates for a later period in which different FERC-regulated contracts governed the "allocation of power supply resources . . . between the public load served by Nantahala [in North Carolina] and the private industrial load served by Tapoco [in Tennessee]." App. 29a. Here, in contrast to the earlier cases, the NCUC *gave* full effect to FERC's regulation of interstate wholesale cost and power allocations in setting Nantahala's retail rates. Indeed, the NCUC did precisely what appellants claimed to be required by federal law: the NCUC included in Nantahala's retail rates and revenue requirements *all* the cost incurred as a result of the FERC rate schedules, subject to a refund if, and only to the extent that, FERC subsequently modified the rate schedules.[5] *See* App. 73a.

However, the North Carolina Supreme Court reversed the NCUC's order on a single ground: that the NCUC should give further consideration to continuing the wholesale cost and power allocation methodology adopted by the NCUC in *Nantahala I* and *Nantahala II* indefinitely and that the NCUC need not, therefore, give effect to FERC's regulation in setting retail rates in this case. *See* App. 41a–42a. Thus, the North Carolina

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4 *Id.* at 14-15.

5 The NCUC as well as the North Carolina Attorney General are participating in now-pending FERC proceedings in which FERC is, again, considering the fairness of the contractual allocations of the low-cost wholesale power supplies between North Carolina and Tennessee. *See Tapoco, Inc., et al*, 30 FERC (CCH) ¶ 63,050 (Initial Decision issued February 26, 1985) (exceptions pending).

Supreme Court ordered that "[t]his case is remanded to the [NCUC] for further proceedings in light of [the] decisions in *Nantahala I* and *Nantahala II*." App. 51a.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

The disposition of the Federal Power Act and Commerce Clause issues in *Nantahala I*, No. 85-568, should control this case. If appellants' claims in *Nantahala I* are accepted, there will be no basis for the further proceedings that the North Carolina Supreme Court has ordered. The NCUC has already done precisely what appellants claim to be required by the Federal Power Act and the Commerce Clause: it set retail electric rates on the basis of the interstate cost and power supply allocations contained in the governing FERC rate schedules, subject to future refunds only to the extent that FERC hereafter modifies the rate schedules in the now-pending proceedings. *See* Appellants' Brief in *Nantahala I*, No. 85-568 (filed Jan. 22, 1986) at 21-39. Indeed, the sole ground for the North Carolina Supreme Court's decision to reverse the NCUC was the holding that the NCUC is not bound by the wholesale cost and power allocations that result from FERC regulation. Thus, the NCUC order in this case would have to be affirmed if appellants prevail on their federal claims in *Nantahala I*.

There also is no question that the North Carolina Supreme Court decision is a "final judgment" within the meaning of 28 U.S.C. § 1257 and that this Court will have jurisdiction to enter an appropriate order in this case following the decision in *Nantahala I*, No. 85-568. Because the North Carolina Supreme Court "has finally determined the federal issue[s] present in [this] case," this Court's decisions make it very clear that appellants need not spend years litigating the appropriate interstate cost and power supply allocations before the NCUC and the North Carolina Supreme Court, before appellants may come to this Court and seek to have the original NCUC order reinstated. *See Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 476 (1975). That not only would create "economic waste and

delay justice," *Radio Station WOW, Inc. v. Johnson*, 326 U.S. 120, 124 (1945), but also would "seriously erode" the national policy of having these determinations made by FERC, and not by duplicative state proceedings. *Compare Construction & General Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963), *with* Appellants' Brief in *Nantahala I*, No. 85-568 at 31-32. *See generally Cox Broadcasting Corp. v. Cohn*, 420 U.S. at 476-87.

CONCLUSION

For the reasons stated, this case should be retained on the Court's docket pending the decision in No. 85-568, and the Court should thereafter dispose of this case in a manner consistent with the final disposition of No. 85-568.

Respectfully submitted,

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